2004

Philip F. Coxey v. Fraternal Order of the Eagles, Aerie No: 2742 : Reply Brief

Utah Supreme Court

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IN THE UTAH SUPREME COURT

PHILIP F. COXEY,	:	
Plaintiff/Appellant,	:	
vs.	:	
FRATERNAL ORDER OF THE EAGLES, Aerie No: 2742,	:	Case No. 20040298-CA
Defendant/Appellee.	:	

REPLY BRIEF OF APPELLANT PHILIP F. COXEY

Appeal From the Second District Court, Ogden Department
Judge Pamela G. Heffernan Presiding

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PRESERVATION OF ISSUE FOR APPEAL

Appellee Fraternal Order of Eagles ("FOE") argues that Plaintiff failed to preserve the issue regarding application of the 1999 Utah Rules of Civil Procedure to this case. However, Plaintiff expressly pointed out to the trial court that the pre-amended 1999 rules applied. (R. at 620). Moreover, FOE themselves previously argued that the 1999 Utah Rules of Civil Procedure applied to this case. (R. 306). Indeed, in analyzing whether to grant a new trial, the trial court itself applied the 1998 rules. "The court finds that the defense had no obligation under the 1998 version of Rule 26 to furnish plaintiff with a written report by Mr. Capehart." (R. at 396). Plaintiff pointed out that the 1998 Rules applied. FOE themselves argued that the 1998 rules applied. The trial court actually applied the 1998 rules to the benefit of FOE. It simply cannot be argued that the issue has not been preserved for appeal.

RESPONSE TO FOE'S STATEMENT OF THE CASE AND FACTS

1. FOE correctly notes that this case was previously tried to a jury.
2. Although FOE argues that the trial court somehow 'limited' the new trial to the issue of expert witness testimony. However, no where did the trial court's original order granting the second trial limit the scope of that trial in any way, shape, or form. (R. at 392-401).
3. At the second trial, Mr. Coxey sought to use still photographs taken from a videotape. Many of the electrical outlets at the campground had exposed wires. Prior to the first trial in this case, the court entered an order prohibiting plaintiff from displaying photographs taken of the campground's poorly maintained electrical outlets. Just before the second trial, plaintiffs new counsel obtained a copy of the videotape taken shortly after the incident in this case. Because the videotape displayed the area's electrical outlets which

the court had previously prohibited plaintiff from displaying, plaintiffs new counsel obtained still photographs from the video showing only the area where Mr. Coxey was camping.

4. FOE offers no evidence of prejudice due to the undisclosed videotape. First, FOE can still have medical experts review the footage if desired.[1] FOE can also prepare a cross examination of Mr. Coxey after reviewing the videotape. Third, FOE merely speculates that they will be unable to locate the adjacent trailer and its owner. Finally, and as noted above, FOE may still question the Coxeys about the videotape and, indeed, might even redepose the witnesses as part of preparing for the next trial. FOE raises, at best, difficulties associated with a late discovery disclosure, not prejudice to the same degree as will be imposed by upholding dismissal of the claims.

5. Although the trial court may have granted the dismissal on the basis of a willful failure to disclose, FOE themselves willfully failed to supplement interrogatories and disclose expert testimony prior to the first trial. (R. at 392-395). As a result of the prejudice imposed upon the plaintiff, the trial court granted a new trial in order to 'cure' the prejudice, but imposing significant costs in terms of time and expense upon the plaintiff.

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[1] Notably, FOE does not assert that: (1) they cannot have the emergency room nurse review the tape and offer testimony; or, (2) that the 'deceased caretaker' would have had opportunity even if the videotape were timely disclosed. Accordingly, there is no prejudice attaching to either position in the absence of evidence to the contrary.

ARGUMENT

VIDEOTAPES ARE NOT PHOTOGRAPHS AND ANY 'FAILURE' TO DISCLOSE CANNOT JUSTIFY THE EXTREME SANCTION OF DISMISSAL.

While trial courts have discretion to set sanctions for failure to comply with discovery, that discretion should be employed in an equitable and just manner. Here, the trial court first allowed defendant to call an expert witness who, despite repeated requests, had never been fully disclosed or identified. (R. at 392-395). After recognizing its error, the trial court then granted plaintiff a new trial. (R. at 402). The trial court could have easily directed verdict for the plaintiff as a sanction for defendant's failure to disclose. However the trial court chose the less extreme remedy of granting a new trial and thereby alleviating the prejudice imposed by FOE's incomplete and inadequate disclosure.

Unfortunately, when it came time to deal with Mr. Coxey's alleged nondisclosure, the trial court chose the extreme sanction of dismissal. Courts must be equitable, fair and just in applying their discretion. Here, the court allowed FOE to play lose and fast with the rules regarding expert witness disclosures, but only sanctioned such conduct with a 'new trial' at considerable expense and prejudice to Mr. Coxey. FOE's interrogatories required disclosure and production of photographs of the scene and injuries, not videotape. FOE desires to uphold a rule where failure to understand a vague or ambiguous interrogatory results in dismissal of the case. By wholly dismissing Mr. Coxey's claim for not disclosing a videotape, a tape which arguably did not need to be disclosed, the trial court failed to act with equity in its treatment of the parties. The trial court's unfair application of discovery sanctions requires reversal even assuming that plaintiff violated a discovery rule or order.

A. THE TRIAL COURT OVER-REACHED ITS DISCRETION IN DEALING WITH DISCLOSURE OF THE VIDEOTAPE WHERE NO DISCOVERY VIOLATION OCCURRED.

While trial courts enjoy broad discretion in applying sanctions, that discretion is limited by the severity of any alleged violation. FOE relies heavily upon *Morton v. Continental Baking Co.*. However, *Morton* was a split decision, with Justices Stewart and Durham strenuously arguing against the majority opinion. At the very least, the dissent should be heeded for the following proposition.

> The degree of discretion accorded trial courts varies in proportion to the severity of the sanction imposed. It follows that a trial court's range of discretion is more narrow when it imposes the ultimate sanction of dismissal than when it imposes less severe sanctions. Appellate courts must therefore examine a dismissal or entry of a default judgment with much greater care and scrutiny than a lesser sanction. The majority opinion ignores this established principle. Although trial courts are afforded due deference in their choice of sanctions, an appellate court cannot simply rubber-stamp the decisions of the lower court.

Morton v. Continental Baking Co., 938 P.2d 271, 280 (Utah 1997)(Stewart, J. dissenting).

An extreme sanction of dismissal remains unjust, unfair and inappropriate for the simple failure to disclose a videotape, especially in the absence of an order compelling production or a rule requiring production. In each of the cases cited where dismissal was appropriate, the conduct was truly of a persistent and egregious nature. *See, e.g., Amica Mut. Ins. Co. v. Schettler*, 768 P.2d 950, 962 (Utah Ct. App. 1989)("The record in this case clearly demonstrates a pattern of aggravated misconduct in the form of willful and deliberate disobedience of discovery orders, fabricated testimony, and attempted witness tampering.").

FOE was allowed to call an expert at the first trial over the objection of Plaintiff's counsel. FOE failed to supplement interrogatories specifically requesting information regarding that expert. (R. at 392-395). The trial court, exercising discretion, cured the prejudice by

granting a new trial, rather than directing a verdict for FOE's intentional refusal to supplement. By contrast, dismissing for failure to disclose a videotape, where no rule of civil procedure or court order mandated disclosure, represents an arbitrary and unbalanced application of the trial court's discretion. The trial court's power to sanction "falls short of unreasonable and arbitrary action which will result in injustice." *Westinghouse Elec. Supply Co. v. Paul W. Larsen Contractor, Inc.*, 544 P.2d 876, 878 -879 (Utah 1975). Other, less extreme means of curing any claimed prejudice existed. The trial court could easily have excluded the evidence. The trial court could easily have reset trial and given FOE opportunity to investigate based upon the videotape. Depriving Mr. Coxey of a fair trial cannot be considered as equitable or fair where the trial court did not apply a similar sanction to the more direct violation of discovery rules by FOE for failing to answer a specific interrogatory requesting information on their experts.

B. RULE 37 FAILS TO SUPPORT THE SANCTION OF DISMISSAL IN THIS CASE.

FOE claims that Appellant failed to raise the argument below that the 1999 rules applied to this case. Yet, in opposing a new trial for their failure to supplement interrogatories, FOE argued that the 1999 rules applied. Further, Appellant specifically argued that application of these rules. Defense Counsel argued that the "amendments to Rule 26 requiring them to furnish an expert report did not apply to this case because it was filed in 1998." (R. at 395). "Defendant was never obligated to provide an expert witness report, because the rule requiring such reports is 'only applicable to cases filed on or after November 1, 1999." (R. at 306). FOE simply cannot argue that anything other than the pre-1999 amended rules applied to this case where they themselves argued that those rules applied. Finally, the trial court itself found "that the defense

had no obligation under the 1998 version of Rule 26 to furnish plaintiff with a written report by Mr. Capehart." (R. at 396). Clearly, the pre-amendment rules control in this case, FOE's argument to the contrary notwithstanding.

FOE claims that the trial court may dismiss the case as a sanction for an evasive or incomplete answer to an interrogatory. (Appellee's Brief at p. 13). FOE fails to point out how non-disclosure of a videotape is either evasive or incomplete. FOE failed to ask about the existence of any video footage during the depositions of Mr. and Mrs. Coxey. FOE cannot support the severe sanction of dismissal through their own failures to conduct effective discovery. FOE themselves failed to answer discovery directed specifically at whether an expert would testify, the testimony of that expert, his qualifications. (R. 392-395). Based upon FOE's argument, there should not have been a new trial for such direct refusal to participate in discovery, but rather a directed verdict.

The failure to disclose a videotape, when the discovery requests photographs, does not constitute the type of flagrant discovery violation warranting the sanction of dismissal. Importantly, none of the authorities cited by FOE actually upheld dismissal based upon an alleged discovery failure without contemporaneous violation of a court order. *See, e.g., Morton*, 938 P.2d at 273 ("the court made it clear that Morton had until 5:00 o'clock p.m. on the tenth day from the signing of the order to comply ... Morton did not respond in any way to either the notice to submit or the court's order."); *Hales v. Oldroyd*, 999 P.2d 588, 592 (Utah App.,2000)(the trial court clearly relied in part on Hales's failure to comply with a court order under Rule 37(b)(2)(C) in dismissing her claim.); *Preston & Chambers, P.C. v. Koller*, 943 P.2d 260, 262 -263 (Utah Ct. App. 1997)("because the trial court issued an order imposing a discovery deadline, which

Koller failed to meet, the decision to sanction Koller by dismissing his counterclaims is within the court's discretion."). Dismissal of Mr. Coxey's case imposes the harshest of sanctions for a questionable discovery violation and cannot be upheld as action within the trial court's discretion.

C. NEITHER RULE 41(b) NOR RULE 60(b)(6) SUPPORT DISMISSAL OF MR. COXEY'S CLAIMS.

FOE asserts that "Mr. Coxey gives the false impression that the trial court dismissed his case by relying solely on Utah Rule of Civil Procedure 37." (Appellee's Brief at p. 14). This is not a 'false impression,' it is a fact. Nowhere does the trial court cite, suggest or rely upon any rule other than Rule 37 in its Order. (R. at 392-400).

However, even if Rules 41 or 60 were relied upon, they cannot support the dismissal with prejudice of Mr. Coxey's claim. Rule 41(b) allows for dismissal only where the plaintiff fails "to prosecute or to comply with these rules or any order of court." Utah R. Civ. P. 41(b) (1999). As has been pointed out, there was no violation of a court order in this case. Additionally, Appellant complied with all rules of civil procedure in effect at the time. No obligation existed to disclose the videotape, absent an interrogatory or request directed at production of videotape. Broadly reading photograph to mean videotape, where the opposing party used both terms in separate interrogatories, places the party opponent in the position of seer and soothsayer. If there had been sketches made, would these also count as 'photographs?' If there had been a recorded voice description of the area, would this also count as a 'photograph' subject to disclosure? FOE used each term, videotape and photograph, advisedly. (R. at 923-924). Mr. Coxey should not be sanctioned *by dismissal* for responding only to the question posed by FOE. At most, there exists

a technical violation of discovery procedure insufficient to sustain the exceptional sanction of dismissal.

Rule 60(b) cannot be employed to undo the grant of a new trial. In *Drury v. Lunceford*, 18 Utah 2d 74, 76-77, 415 P.2d 662, 664 (Utah 1966) the Utah Supreme Court refused to uphold the trial court's decision to set aside, under Rule 60(b), the grant of a new trial.

> when the trial court has made his decision granting the new trial, that has the effect of vacating the judgment and the case reverts to its status before the trial was had. The party favored by the motion acquires an important right in his entitlement to a new trial, which he should not be arbitrarily deprived of, nor should he be subject to the possible whim or caprice of the judge as to whether he can really have the new trial which has been ordered or not.

Id.

Here, the trial court found that, by allowing FOE's expert to testify, it so prejudiced the case against Mr. Coxey that a new trial was warranted. The case returned, at that point, to a pretrial status as if the claims were never tried. Rule 60(b) also affords no excuse to deprive Mr. Coxey of his right to a new trial and cannot form the basis upon which to affirm the trial court's inappropriate sanction of dismissal.

D. DISMISSAL REMAINS AN INAPPROPRIATE SANCTION FOR NOT FAILING TO READ 'PHOTOGRAPH' TO REQUIRE PRODUCTION OF VIDEOTAPE.

The failure to understand that FOE intended to include videotape within the term 'photograph' cannot sustain an extreme sanction of dismissal. FOE used the term videotape in a separate interrogatory directed to interviews. FOE themselves stand guilty of a far more flagrant disregard for the discovery process. They initially responded to interrogatories directed specifically at expert witnesses with only the vague 'may be called.' FOE never supplemented

any of the requested information, despite the fact that the discovery went specifically to expert witnesses. FOE then called an expert they identified only as a 'consultant.' FOE never identified the expert as one who would testify at trial. FOE never answered the interrogatory requesting a brief description of the expert's testimony. FOE directly and wilfully refused to comply with specific interrogatories directed at specific issues. FOE's claim that plaintiff's conduct was 'egregious' fails when compared to their own discovery misconduct. Rather than direct a verdict for Plaintiff, the trial court began the process anew. Equity and fairness demand that Plaintiff be accorded the same treatment for a far less culpable, and more understandable violation.

Nor do any of the factors cited by the trial court support dismissal. There is no finding that the 'deceased caretaker' would have had opportunity to review the videotape, even if it had been timely disclosed. Moreover, the 'unavailability' of an out-of-state nurse is nothing more than speculation. Finally, there is no finding that the camper depicted in the video, or its owners, cannot be located.

The cases cited by FOE contain truly unconscionable discovery misconduct, not mere failure to understand the breadth of information sought by the term 'photograph.' In *Marshall v. Marshall*, 915 P.2d 508, 515 (Utah Ct. App. 1996) the offender "secreted approximately $180,000 of his income... never presented the statements evidencing payment of [] obligations in compliance with the May 27, 1994 discovery order... failed to reveal several savings and investment accounts he held with Prudential and failed to comply with the trial court's discovery order by providing documentation of these accounts." In *Hill v. Dickerson*, 839 P.2d 309 (Utah Ct. App. 1992) the offending party received a continuance, then on the eve of trial named *six new fact witnesses*, along with a previously undisclosed expert witness. In *Schoney v. Memorial*

Estates, Inc., 790 P.2d 584 (Utah Ct. App. 1990) the party filed *five* amended complaints, failed to timely provide discovery, and directly violated "an order fixing a cut-off date for discovery." *Id.* at 586. In *Tucker Realty, Inc. v. Nunley*, 396 P.2d 410 (Utah 1964) the defendant first claimed that he had records available, then refused to produce them, then argued that the records did not exist. The court found "the vagaries of defendant's changing positions" and unwillingness to comply with ordered production supported dismissal.

The conduct in each of the cases cited by FOE clearly eclipses the failure, if any, of Mr. Coxey in this case. Failing to produce a videotape in response to discovery requesting photographs simply does not rise to the sanctionable level of dismissal.

NO LIMIT ON THE SCOPE OF THE NEW TRIAL MAY BE IMPOSED

FOE does not cite a single authority to counter that the grant of a new trial resets the party's positions as if the first trial never occurred. Utah law clearly demands that the scope of the new trial not be limited. *See*, *Hyland v. St. Mark's Hospital*, 427 P.2d 736 (Utah 1967); *Haslam v. Paulsen*, 389 P.2d 736 (Utah 1964); *and*, *Klinge v. Southern Pacific Co*, 57 P.2d 367 (Utah 1936). FOE cites nothing in the trial court's Order granting a new trial which limits the scope. Absent an express limitation in that Order, and absent some compelling reason to depart from the relevant case authority, there can be limits on the scope of evidence and witnesses produced at the new trial. By limiting the scope of the new trial to that of the previous trial, the court may as well read a transcript of the first trial to the jury and allow presentation of expert witness testimony from plaintiff to rebut the improper testimony of FOE's undisclosed expert.

CONCLUSION

FOE cites no authority directly supporting the dismissal of a case for discovery misconduct without a contemporaneous non-compliance with a direct court order. The sanction of dismissal remains inappropriate given that no court order was violated. Additionally, the trial court erred in imposing the extreme sanction of dismissal to, at best, a technical violation of discovery rules. The trial court ignored equity in applying remedies for any supposed violation. FOE failed to respond to direct and specific discovery requests. FOE's conduct prejudiced Mr. Coxey to the degree that the trial court granted a new trial, in an attempt to remedy the prejudice imposed by FOE's misconduct. Mr. Coxey merely failed to provide a videotape in response to discovery requesting photographs. Equity demands that there be consistency in ruling for each party and that Mr. Coxey be given the same latitude for his conduct, a far less obvious discovery violation, than that of FOE.

DATED this 27 day of October, 2004.

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CERTIFICATE OF MAILING

I hereby certify that on this 29th day of October, 2004, I mailed a true and correct copy of the above and foregoing Reply Brief of Appellant Philip F. Coxey, postage prepaid to:

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